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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

11 SOPHIA DAIRE,) Case No. CV 10-3743-DMG (AJW)
12 Petitioner,)
13 v.) **ORDER ACCEPTING IN PART AND**
14 MARY LATTIMORE, WARDEN,) **REJECTING AND MODIFYING IN**
15 Respondent.) **PART REPORT AND**
16) **RECOMMENDATION OF**
17) **MAGISTRATE JUDGE**

18 Having reviewed the entire record in this action, the Report and
19 Recommendation of Magistrate Judge (“Report”) [Doc. # 34], and petitioner’s
20 objections [Doc. # 36], the Court has made a *de novo* determination of the portions
21 of the Report to which objections were directed. Based thereon, the Court concurs
22 with and accepts the findings of fact, conclusions of law, and recommendations
23 contained in the Report, except as explained hereinafter.

24 This Court agrees with the Magistrate Judge that trial counsel’s failure to
25 investigate and present any mental health evidence to support petitioner’s *Romero*¹

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27 ¹ *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789 (1996), holds
28 that a trial court has the power to dismiss prior felony allegations in a case subject to California’s
“Three Strikes” law, Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d).

1 motion amounted to deficient performance. For the reasons set forth below,
 2 however, this Court respectfully disagrees with the Magistrate Judge's
 3 determination that he "cannot say that the state court's conclusion is an
 4 unreasonable application of *Strickland*'s² prejudice standard."³

5 **I. PREJUDICE EXISTS UNDER THE *STRICKLAND* STANDARD**

6 In denying Sophia Daire's petition for writ of *habeas corpus*, the California
 7 Superior Court concluded that trial counsel's performance did not fall below
 8 "prevailing norms," and that petitioner's *Romero* motion would have been denied
 9 even if trial counsel had presented evidence of her mental illness. (1st Am. Pet.,
 10 Ex. A at 8, 9.) [Doc. # 18-1.] Therefore, in the Superior Court's view, the
 11 omission of this evidence had no impact on the sentence petitioner received.
 12 Although the Magistrate Judge found that trial counsel's legal representation in
 13 connection with the *Romero* motion was indeed deficient, he nonetheless
 14 concluded that, even if the *Strickland* standard applied at the sentencing phase,
 15 there was no prejudice here. (Report at 16-17.)

16 In *Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 173 L.Ed.2d 251
 17 (2009), the Supreme Court explained that the *Strickland* standard is highly
 18 deferential to the state court's conclusion: the question "'is not whether a federal
 19 court believes the state court's determination' under the *Strickland* standard 'was
 20 incorrect but whether that determination was unreasonable—a substantially higher
 21 threshold.'" *Id.* at 123 (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct.
 22 1933, 167 L.Ed.2d 836 (2007)). Notwithstanding the high level of deference to be
 23 accorded the state court's decision, this Court finds that the Superior Court's

26 ² *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

27 ³ This Court accepts and adopts the Report, except for the following: page 16, line 10
 28 through page 17, line 6.

1 conclusion is an unreasonable application of *Strickland*'s prejudice standard and
2 disagrees with the Magistrate Judge to the extent he found to the contrary.

3 Important to the prejudice assessment, and not even mentioned in the
4 Superior Court's denial of *habeas* relief, is the fact that when declaring a mistrial
5 after the first trial ended with a deadlocked jury, the trial court stated, "[t]he court
6 could attempt to undercut the People's offer, certainly on *Romero*, and **I think**
7 **there's a strong basis for that.**" [RT D-27 (emphasis added).] This statement
8 suggests that the trial court, which had just heard the evidence presented during the
9 first trial, was inclined to find a basis for granting a *Romero* motion. The *Romero*
10 motion ultimately presented to the trial court, however, failed to include *any*
11 evidence regarding petitioner's severe mental illness, the effect of that mental
12 condition on her culpability, and the medical opinion that her illness was treatable.
13 The failure of counsel to present evidence of a defendant's mental illness as a
14 mitigating circumstance at sentencing is "a deficiency that has repeatedly been
15 found prejudicial" under *Strickland*. *James v. Ryan*, __ F.3d __, 2012 WL 639292,
16 at *33, 2012 U.S. App. LEXIS 4100, at *93-94 (9th Cir. Feb. 29, 2012) (citing
17 cases). As a result of this significant omission of highly relevant evidence, the trial
18 court stated its understanding that "it is her **drug problem** that is spurring her on to
19 re-offend." [RT 236-237 (emphasis added).] Thus, the trial court denied the
20 *Romero* motion at sentencing.

21 This Court finds that the mental illness evidence omitted by counsel in the
22 *Romero* motion, as set forth more fully in the Magistrate Judge's Report at pages
23 11-12, directly relates to the degree of petitioner's culpability, potentially explains
24 her drug use and recidivism, and would have provided the "strong basis" for the
25 *Romero* motion that the trial court initially anticipated.

26 The Superior Court's order denying the *habeas* petition introduced the
27 prejudice discussion with its conclusion that "[e]ven if the trial court would have
28 heard more **argument** concerning Daire's drug use, psychological issues, and

1 childhood, Daire's sentence would not have been any different." (First Amended
2 Petition for Writ of Habeas Corpus, Exhibit A at 9 (emphasis added).) [Doc. # 18-
3 1.] The Superior Court did not properly address the prejudice that ensued due to
4 the failure to present *any evidence* of serious mental illness. Instead, the court
5 appeared to assume, erroneously, that the attorney's deficient representation
6 involved only the omission of more legal "argument." It did not so much as
7 acknowledge the trial counsel's complete failure to marshal the existing facts
8 which most dramatically underscore the breadth and scope of petitioner's mental
9 condition. The Superior Court purported to support its conclusion by citing the
10 appellate court's observation that petitioner was precisely the type of criminal for
11 whom the Three Strikes law was devised. (*Id.* at 10.) This, of course, begs the
12 question and is irrelevant to an analysis of the prejudice issue. The Superior Court
13 then went on to discuss the issues raised on appeal and concluded that petitioner's
14 "attempt to attribute her long record of recidivism to a long standing and serious
15 substance abuse and/or psychological disorder is unavailing. As the Court of
16 Appeal noted, Daire's prospects upon release from prison are dim, especially when
17 Daire reoffended shortly after being released from prison." (*Id.* at 11.) This is the
18 only passage that can even arguably be construed as an attempt to address the
19 prejudice prong. Yet, the Superior Court assumed that the absence of prejudice
20 was a foregone conclusion and supported that conclusion with the facts as they
21 appeared to the sentencing and appellate courts. It, therefore, failed to even
22 consider whether the presentation of mental health evidence could have made a
23 difference to the sentencing court.

24 Not only is there a reasonable probability that there would have been a more
25 favorable outcome if trial counsel had presented evidence of the petitioner's severe
26 mental illness to the sentencing court, the Superior Court's finding of a lack of
27 prejudice was an unreasonable application of *Strickland's* prejudice standard.
28

II. THIS COURT CANNOT APPLY *STRICKLAND* TO A NONCAPITAL SENTENCING CASE

Having determined that petitioner's claim of ineffective assistance of counsel during the sentencing phase meets the *Strickland* standard, this Court nevertheless is constrained from granting a writ because of the Ninth's Circuit's decision in *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006) (citing *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1244 (9th Cir. 2005)). In *Davis*, the Court held that "since *Strickland*, the Supreme Court has not delineated a standard which should apply to ineffective assistance of counsel claims in noncapital sentencing cases. Therefore, . . . there is no clearly established federal law as determined by the Supreme Court in this context." 443 F.3d at 1158 (internal citation omitted). This Court respectfully disagrees with *Davis* and *Cooper-Smith*. In *Glover v. United States*, 531 U.S. 605 (2001), which predates both *Davis* and *Cooper-Smith*, the Supreme Court applied the *Strickland* standard to a noncapital sentencing proceeding. Judge Graber's concurrence in *Davis* recognizes that after *Glover*, there is clearly established federal law as determined by the Supreme Court that *Strickland* applies to noncapital sentencing proceedings. 443 F.3d at 1159-60; accord *Davis v. Belleque*, No. 10-36035, 2012 WL 76897, at *1, 2012 U.S. App. LEXIS 760, at *2-3 (9th Cir. Jan. 11, 2012) (unpublished disposition) (Paez, J., concurring). This view is confirmed in the Supreme Court's recent decision in *Lafler v. Cooper*, __ U.S. __, __ S.Ct. __, 2012 WL 932019 (Mar. 26, 2012), in which the Supreme Court stated as follows:

The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see *Glover v. United States*, 531 U.S. 198, 203-204, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001); *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), and capital cases, see *Wiggins v. Smith*, 539 U.S. 510, 538, 123 S.Ct. 2527,


1 156 L.Ed.2d 471 (2003). Even though sentencing does
2 not concern the defendant's guilt or innocence,
3 ineffective assistance of counsel during a sentencing
4 hearing can result in *Strickland* prejudice because "any
5 amount of [additional] jail time has Sixth Amendment
6 significance." *Glover, supra*, at 203, 121 S.Ct. 696.

7 2012 WL 932019, at *6.⁴

8 Irrespective of the proper interpretation of the Supreme Court precedents
9 pertaining to ineffective assistance of counsel, this Court is bound by *Davis* and
10 *Cooper-Smith* until they are reversed *en banc* or by the Supreme Court. *Hart v.*
11 *Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Accordingly, this Court
12 reluctantly concurs with the Magistrate Judge's ultimate recommendation that
13 judgment be entered denying the petition.

14 IT IS SO ORDERED.

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16 DATED: April 9, 2012

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18 DOLLY M. GEE
19 United States District Judge
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26 ⁴ Since *Cooper-Smith*, the Ninth Circuit has also applied the *Strickland* standard to
27 noncapital sentencing *habeas* petitions, albeit finding no prejudice under that standard without
28 directly addressing *Strickland*'s applicability. See *Gonzalez v. Knowles*, 515 F.3d 1006 (9th Cir.
2008) (finding no prejudice under *Strickland* because there was no evidence showing that *habeas*
petitioner was mentally ill).